

/s/ Bridget Cohee
Circuit Court Judge
Ref. Code: 22GKSZM9X

E-FILED | 11/22/2022 11:40 AM
CC-02-2022-F-8
Berkeley County Circuit Clerk
Virginia Sine

In the Circuit Court of Berkeley County, West Virginia

State of West Virginia,
Plaintiff,

v.

Case No. CC-02-2022-F-8
Judge Bridget Cohee

Lateef McGann,
Defendant

Hearing Order of November 17, 2022

On the 17th day of November, 2022, this matter came on for a hearing on the State's motion to reconsider. The State of West Virginia appeared by Joseph Kinser, Assistant Prosecuting Attorney for Berkeley County. The Defendant appeared in person and by counsel, S. Andrew Arnold, Esq.

The Court advised that it had reviewed the State's written motion, then allowed for oral argument. Both parties made argument on the record. The State argued that *State v. Crabtree*, 198 W.Va. 620 (1996) is determinative on the issue before the Court and asked the Court to find that the incorrect subsection citation in the State's Recidivist Information was a typographical error that did not prejudice or surprise the Defendant in any way. The State further asked the Court to find that, even if the typographical error was somehow prejudicial, that the State's Amended Information, which was timely filed eighteen days after the first information and on which the Defendant was arraigned[1], remedied any issues.

The Defendant argued that State is relying on dicta from *State v. Crabtree* and there were no syllabus points in that case on this issue. The Defendant further argued that *Ringer v. Boles*, 151 W.Va. 864 (1967) and *Holcomb v. Ballard*, 232 W.Va. 253 (2013) require that the Court stand upon its prior ruling and find that there is no such

thing as harmless error in a recidivist information.

The Defendant further argued that there was no lawful procedural mechanism for the State's Motion to Reconsider, as it does not fall within the parameters of Rule 35 of the West Virginia Rule of Criminal Procedure. The State conceded that there was no procedural authority for the motion, but that it was a practical request to have the Court reconsider its ruling prior to the State seeking a Writ of Prohibition.

The Court indicated that any decision made on this issue would prejudice one of the parties. The Court then suggested filing a Certified Question with the Supreme Court on this issue. Counsel for the Defendant argued that the proper manner for appellate review would be for the Court to DENY the State's motion to reconsider and require the State to file a Writ of Prohibition if it desired to do so.

Accordingly, the Court does DENY the State's Motion to Reconsider the dismissal of 22-F-8. As a basis for this ruling, the Court FINDS that *State v. Crabtree* did not create any syllabus points overturning *Ringer v. Boles*. The Court further FINDS that the erroneous citation in the State's original information was error. Further, the State's attempt to remedy the error by filing an amended information in 21-F-248 instead of in 22-F-8 was not harmless error.

Understanding that the State intends to pursue a Writ of Prohibition with the West Virginia Supreme Court of Appeals, it is ORDERED that this matter shall come on for a Status/Sentencing hearing on the 30th day of January, 2023 at 2:30 p.m.

The Clerk SHALL enter this order and provide a copy to all counsel of record.

[1] W.Va. Code § 61-11-19 requires the Defendant to answer to a recidivist information at a hearing in Circuit Court. While not technically an arraignment, it is sometimes referred to as an arraignment.

/s/ Bridget Cohee
Circuit Court Judge

23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.